IN THE MISSOURI SUPREME COURT

Case No. SC 084372

STATE EX REL. CINDY KERTZ,

Relator,

v.

THE HONORABLE MARGARET M. NEILL,
Presiding Judge of the Missouri Circuit Court,
Twenty-Second Judicial Circuit (St. Louis City)

Respondent.

Original Proceeding in Mandamus

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This extraordinary writ proceeding involves: (1) the question of whether Respondent properly followed existing law by transferring Relator's lawsuit against an individual and a corporation from the city of St. Louis, pursuant to RSMo. §476.410, to a proper venue as determined by RSMo. §508.010; and (2) whether a Writ of Mandamus is a proper proceeding to change existing law. This Court has jurisdiction of this Writ proceeding under Article V, §4, of the Missouri Constitution.

STATEMENT OF FACTS

Respondent provides the following Statement of Facts for completeness and clarification.[1]

On October 9, 2000 Dale Kertz was fatally injured in a tractor/train accident at a railroad crossing in McBride, Perry County, Missouri, when he drove the tractor he was operating into the path of a train operated by Defendant, Mark Pobst, an employee of The Burlington Northern and Santa Fe Railway Company (hereinafter "BNSF"). At the time of the accident, Dale Kertz resided in Perry County, Missouri, with his wife, Cindy Kertz.

On September 12, 2001 at 4:32 p.m., Cindy Kertz (Relator herein), initiated suit against BNSF as the sole defendant in the Circuit Court of the city of St. Louis. BNSF is a common carrier by rail, incorporated in Delaware, which owned the line of railroad where the accident occurred. Additionally, BNSF owns and operates a line of railroad in the city of St. Louis and numerous counties in Missouri, including St. Louis County, where it transacts business and where it was served with Summons and Petition on September 24, 2001 at the office of its agent for service of process, established pursuant to RSMo. §351.586.

On September 13, 2001 at 8:38 a.m., Relator abandoned her original petition by filing a First Amended Petition initiating suit against Mark Pobst and BNSF in the Circuit Court of the city of St. Louis. The Amended Petition was again served on BNSF on

[1] Respondent believes that the facts stated herein are not in dispute.

October 2, 2001 in St. Louis County, Missouri. Defendant Mark Pobst was served at his residence in Scott County, Missouri, on October 17, 2001.

Given the fact that Relator's cause of action did not occur in the city of St. Louis, and neither Mark Pobst nor BNSF resided in the city of St. Louis pursuant to a long and consistent line of decisions interpreting RSMo. §508.010, which is applicable when individuals are joined with a corporation as defendants, BNSF and Mark Pobst timely moved to transfer venue pursuant to RSMo. §476.410 to a proper venue under RSMo. §508.010. BNSF filed its Motion to Transfer Venue on October 19, 2001. Appendix A-1. Mark Pobst filed his Motion to Transfer Venue on November 1, 2001. Appendix A-7. Relator filed its Reply to BNSF's Motion on October 29, 2001 within ten (10) days as required by Rule 51.045. Appendix A-4. However, Relator's Reply to Mark Pobst's Motion was not filed until November 18, 2001. Appendix A-10. (Since November 18, 2001 was a Sunday, it is assumed the Reply was filed on November 19, 2001.) (Appendix A-13).

Following a hearing, the Honorable Margaret M. Neill, Respondent, granted Defendant's Motion to Transfer by Order dated December 18, 2001 and transferred the case to St. Louis County, where the case is now pending. Thereafter, Relator sought a Writ of Mandamus from the Missouri Court of Appeals, Eastern District, which was denied on February 21, 2002. Relator then sought and obtained an Alternative Writ of Mandamus from this Court.

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS AS THE ORDER TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER AS REQUIRED BY PRIOR DECISIONS OF THIS COURT, PUBLIC POLICY, LEGISLATIVE INTENT, THE RULE OF *STARE DECISIS*, AND THIS COURTS HOLDING IN STATE EX REL. LINTHICUM V. CALVIN, WHICH CONTROLS THIS CASE AND SHOULD NOT BE OVERRULED.

A. A WRIT OF MANDAMUS IS NOT A PROPER PROCEEDING FOR CHANGING EXISTING LAW.

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo. banc 1997)

State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786 (Mo. banc 1999)

McDonald v. City of Brentwood, 66 S.W.3d 786 (Mo.App.E.D. 2001)

State ex rel. Mason v. County Legislature, 75 S.W.3d 884 (Mo.App.W.D. 2002)

B. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON PRIOR DECISIONS OF THIS COURT.

RSMo.§ 508.010

RSMo.§ 508.040

RSMo. §351.375

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)

State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951)

State ex rel. Baker v. Goodman, 274 S.W.2d 293 (Mo. banc 1954)

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998)

C. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH § 508.010 IS PROPER BASED ON PUBLIC POLICY.

RSMo. § 508.010

RSMo. § 508.040

State ex rel. Reser v. Rush, 562 S.W.2d 365 (Mo. banc 1978)

State ex inf. Dalton v. Miles Laboratories, 282 S.W.2d 564 (Mo. banc 1955)

State ex rel. Etter, Inc. v. Neil, 70 S.W.3d 28 (Mo.App.E.D. 2002)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

D. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH § 508.010 IS PROPER BASED ON LEGISLATIVE INTENT.

RSMo. § 508.010

RSMo. § 508.040

Missouri Rule of Civil Procedure 51.01

Missouri Rule of Civil Procedure 52.05(a)

State ex rel. Quest Communications v. Baldridge,

913 S.W.2d 366 (Mo.App.E.D. 1996)

State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998)

State ex rel. Webb v. Satz, 561 S.W.2d 113 (Mo. banc 1978)

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994)

E. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH § 508.010 IS PROPER BASED ON THE RULE OF *STARE DECISIS.*

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998)

M&H Enterprises v. Tri-State Delta Chemicals, Inc.,

984 S.W.2d 175 (Mo.App.S.D. 1998).

U.S. Life Title Insurance Co. v. Brents, 676 S.W.2d 839 (Mo.App.W.D. 1984)

State ex rel. Brekenridge v. Sweeney, 920 S.W.2d 901 (Mo. banc 1979)

F. STATE EX REL. LINTHICUM V. CALVIN IS CONSISTENT WITH PUBLIC POLICY AND LEGISLATIVE INTENT AND SHOULD NOT BE OVERRULED.

RSMo. § 508.010

RSMo. § 508.040

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

Bailey v. Innovative Mgmt. & Inv. Inc., 890 S.W.2d 648 (Mo. banc 1995)

Trans. UCU, Inc. v. Director of Revenue, 808 S.W.2d 374 (Mo. banc 1991)

State ex rel. Miracle Recreation Equiptment Co. v. O'Malley,

62 S.W.3d 407 (Mo. banc 2001)

G. STATE EX REL. LINTHICUM V. CALVIN DOES NOT BESTOW AN UNDESERVED BENEFIT ON INDIVIDUALS OR CORPORATIONS WHEN JOINED TOGETHER AS DEFENDANTS.

28 U.S.C. § 1441

28 U.S.C. § 1447

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

H. DETERMINING VENUE WHEN NEW DEFENDANTS ARE ADDED VIA AMENDED PETITION, AS OPPOSED TO THE INITIAL PETITION, DOES NOT RENDER VENUE EVER-CHANGING, NEVER-RESOLVED, AND UNPREDICTABLE.

RSMo. 508.010

RSMo. 508.040

28 U.S.C. § 1441

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

State ex rel. Vaughn v. Koehr, 835 S.W.2d 543 (Mo.App.E.D. 1992)

State ex rel. Mellenbrunch v. Mummert, 821 S.W.2d 108 (Mo.App.E.D. 1991)

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE HER ORDER BECAUSE VENUE IS NOT PROPER IN THE CITY OF ST. LOUIS PURSUANT TO §508.010(2) AS BNSF IS NOT A RESIDENT OF THE CITY.

RSMo. § 508.010

A. UNDER §508.010, BNSF RESIDES IN ST. LOUIS COUNTY, NOT THE CITY OF ST. LOUIS AS ARGUED BY RELATOR.

RSMo. 351.375

RSMo. 351.690

RSMo. 508.010

RSMo. 508.040

State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962)

State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991)

State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951)

B. AS A FOREIGN RAILROAD CORPORATION, BNSF WOULD NONETHELESS BE ENTITLED TO THE SAME BENEFITS AFFORDED TO A DOMESTIC CORPORATION EVEN IF THERE WAS ANY MERIT

TO RELATOR'S ARGUMENT THAT FOREIGN CORPORATIONS SHOULD BE TREATED DISPARATELY FROM DOMESTIC CORPORATIONS.

Mo. Const. art XI § 10

RSMo. 388.290

III. THE GENERAL ASSEMBLY PRESUMED TO BE KNOWLEDGEABLE OF THIS COURT'S DECISIONS INTERPRETING §508.040 AND §508.010 AND THE GENERAL ASSEMBLY'S APPROVAL OF THESE DECISIONS IS LIKEWISE PRESUMED.

RSMo. 351-375

RSMo. 508.010

RSMo. 508.040

State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951)

State ex rel. Smith v. Atterbury, 270 S.W.2d 399 (Mo. banc 1954)

Duckworth v. U.S. Fidelity & Guaranty Co., 452 S.W.2d 280 (Mo.App.E.D. 1970)

IV. THE GENERAL ASSEMBLY IS PRESUMED TO BE AWARE OF THIS COURT'S DECISIONS INTERPRETING § 508.040 AND § 508.010 AND THE GENERAL ASSEMBLY'S APPROVAL OF THOSE DECISIONS IS LIKEWISE PRESUMED.

RSMo. § 508.040

RSMo. § 508.010

RSMo. § 351.375(2)

State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001)

SUMMARY OF ARGUMENT

In this extraordinary Writ proceeding, Relator[2] seeks to change over half a century of precedent interpreting the venue rights of individuals pursuant to RSMo. §508.010 when they are joined with a corporation or corporations as defendants in Missouri courts. Relator's goal is clear. Relator seeks to subject individuals to suit wherever venue is proper against a corporation pursuant to RSMo. §508.040. In so doing, Relator seeks to overturn existing law and drastically limit the venue rights granted by the Missouri General Assembly to individuals by RSMo. §508.010 as interpreted by prior opinions of this Court.

This case illustrates the point. Under RSMo. §508.010 venue is proper as to Mark Pobst in: (1) Perry County (where the accident and cause of action arose), (2) Scott County (where Mark Pobst resides), or (3) St. Louis County (where BNSF resides for venue purposes under RSMo. §508.010). If the venue law is changed as Relator suggests, venue against Mark Pobst, when joined with BNSF as a defendant, would be proper in every county in which BNSF operates its line of railroad, which includes the counties of Adair, Atchison, Barry, Barton, Buchanan, Cape Girardeau, Carroll, Chariton, Clark, Clay, Crawford, Dade, Dunklin, Franklin, Greene, Holt, Howell, Iron, Jackson, Jasper, Jefferson, Knox, Laclede, Lawrence, Lewis, Lincoln, Linn, Livingston, Macon,

[2] Relator refers to Cindy Kertz, the Plaintiff in the case below.

Marion, Monroe, New Madrid, Newton, Oregon, Perniscot, Perry, Phelps, Pike, Platte, Pulaski, Ralls, Ray, St. Charles, St. Louis, Ste. Genevieve, Scott, Shelby, Taney, Webster, Wright, and the city of St. Louis.

For individuals sued along with a major corporation, such as Ford Motor Company, Daimler-Chrysler Motors Corporation, General Motors Corporation, Coca Cola Company, Anheuser-Busch Companies, Inc., and countless others that transact business as determined by RSMo. §508.040 throughout Missouri, they would be subject to suit in virtually each and every county in the state, of which there are 112, irrespective of where they reside, contrary to prior decisions of this Court and the intent of the General Assembly. Such a radical change and departure from existing law should be made only by the General Assembly.

Of course, despite the fact that Relator's argument radically expands the number of venues where individuals could be sued, all of Relator's arguments are designed to accomplish one result and that is to change Missouri's venue laws to allow the filing of this case, and hundreds and thousands of other cases, in the city of St. Louis, even though these cases have no nexus to the city of St. Louis other than the corporate defendant may be found there.[3]

[3] It would not be accurate to say that the City of St. Louis is an attractive venue because there are plaintiffs' experts lined up on every corner to testify or that liberal overused jurors freely give away corporate defendants' money whether a plaintiff deserves it or not, but the City is obviously perceived by many in that light.

In an effort to rationalize this radical departure from the prior holdings of this Court, Relator argues that this Court's past decisions interpreting Missouri's venue statutes were erroneous and have misconstrued the intent of the Missouri General Assembly, and individuals should be subject to suit in any county where the corporate co-defendant is subject to suit. To further rationalize this radical change in Missouri's venue law, Relator argues that prior decisions of this Court holding that a corporation resides, for venue purposes pursuant to RSMo. §508.010, only where it maintains its registered agent and office should be overturned, and further argues that this Court should hold that a corporation "resides" in any location where it transacts business pursuant to RSMo. §508.040 so as to permit plaintiffs to sue individuals in any location where suit could be maintained against a corporation pursuant to RSMo. §508.040.

Alternatively, Relator argues that if this Court does not elect to expand the number of venues where individuals could be subject to suit by overruling existing law as set forth above, she could be permitted to accomplish the same result by initially suing the corporate defendant only in a venue proper under RSMo. §508.040, and then by utilizing a procedural rule, file an amended petition suing an individual and the corporation, and argue that venue was irrevocably set when the initial petition was filed. This scheme was rejected by this Court less than one year ago. Undaunted, Relator implores the Court to overturn that decision as well.

Lastly, Relator argues that this Court has previously misinterpreted Missouri's corporation statutes and that when individuals sued along with a foreign corporation as

contrasted to a domestic corporation, individuals should be subject to suit in any county where a foreign corporation is subject to suit pursuant to RSMo. §508.040. Relator argues that foreign corporations should be treated disparately from domestic corporations (obviously to the detriment of an individual sued along with a foreign corporation), but if an individual is sued with a domestic corporation, venue is proper only in those counties where venue is proper under existing law pursuant to RSMo. §508.010.

In Missouri, it is the function of the General Assembly to determine where venue is proper, and it has made those determinations which have been the subject of a long line of consistent decisions by this Court. In making those determinations, the General Assembly has treated individuals subject to suit differently than corporations by limiting the number of venues that individuals can be sued in, when they are sued alone or with a corporation. There are obviously public policy reasons for limiting the number of venues where individuals can be sued. This Court has recognized and rightfully preserved the deference to individuals granted by the General Assembly to preclude individuals from being subject to suit in an unlimited number of venues, irrespective of where the cause of action arose or where the individual resides. This Court should not overrule those decisions, as it must be presumed that the General Assembly has approved of those decisions as reflective of legislative intent. Likewise, the rule of *stare decisis* dictates that this Court's prior rulings should not be overturned unless there is a compelling reason to do so. In this case there is no compelling reason, and if Missouri's venue laws

are to be changed, the proper forum for such change is the General Assembly, not this Court.

ARGUMENT

I. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS AS THE ORDER TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH RSMo. §508.010 IS PROPER AS REQUIRED BY PRIOR DECISIONS OF THIS COURT, PUBLIC POLICY, LEGISLATIVE INTENT, THE RULE OF *STARE DECISIS,* AND THIS COURT'S HOLDING IN STATE EX REL. LINTHICUM V. CALVIN, WHICH CONTROLS THIS CASE AND SHOULD NOT BE OVERRULED.[4]

A. A WRIT OF MANDAMUS IS NOT A PROPER PROCEEDING FOR CHANGING EXISTING LAW.

The purpose of mandamus is to execute and not to adjudicate. State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446 (Mo. banc 1997). Mandamus is only appropriate when the right to be enforced is clear, unequivocal, specific, and only then to require the performance of a ministerial act. State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786, 788 (Mo. banc 1999). One seeking mandamus must allege and prove a clear and specific right to the thing claimed. McDonald v. City of Brentwood, 66 S.W.3d 46, 50 (Mo.App.E.D. 2001). Mandamus is a discretionary writ

[4] All references to statutes hereinafter are RSMo. 2002 unless noted otherwise.

and no right exists to have the writ issued. State ex rel. Missouri Growth Association v. State Tax Commission, 998 S.W.2d 786, 788 (Mo. banc 1999); State ex rel. Mason v. County Legislature, 75 S.W.3d 884 (Mo.App.W.D. 2002). Mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. State ex rel. Miracle Recreation Equipment Co. v. O'Malley, 62 S.W.3d 407 (Mo. banc 2001, Judge White dissenting). In this case, the law is clear. Based on prior decisions of this Court, venue is not proper in the city of St. Louis. Relator's attempt to judicially change Missouri's long established venue law is an inappropriate function of a Writ of Mandamus and instead, any change in Missouri venue law should be made by the General Assembly.

B. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON PRIOR DECISIONS OF THIS COURT.

In Missouri, the determination of where individuals and corporations may be sued is made by the General Assembly, the legislative branch of government. Article IV, §1 1945 Constitution. State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991). The legislature has enacted two primary venue statutes, §508.010, the general venue statute, and §508.040, the corporate venue statute, which, when interpreted with §351.375, dictates venue in most tort cases in Missouri. For over half a century, since State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), these three statutes have been harmoniously and consistently interpreted by this Court.

If corporations are the only defendants, §508.040 is applicable. State ex rel. Baker v. Goodman, 274 S.W.2d 293, 297 (Mo. banc 1954). This statute establishes venue in any county where the cause of action accrued or any county where the corporation maintains an office or agent for the transaction of business. In the case of railroad corporations, venue is also appropriate in any county where the corporation operates its line of railroad. §508.040.

When individual defendants are the only defendants, or when suit is instituted against an individual along with a corporation, it is well settled that §508.010 determines venue. State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo. banc 1998); State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996); State ex rel. Malone v. Mummert, 859 S.W.2d 822, 824 (Mo. banc 1994); State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 197 (Mo. banc 1991); Dick Procter Imports Inc. v. Gaertner, 671 S.W.2d 273, 275 (Mo. banc 1984).

In State ex rel. Turnbough, which involved a railroad corporation, this Court held, "Section 508.010 RSMo 1969, the general venue statute, rather than §508.040, which deals with suits against corporations, has been held to be the applicable statute when suit is brought against a corporation and an individual." State ex rel Turnbough v. Gaertner, 589 S.W.2d 290, 291 (Mo. banc 1978).

Generally, §508.010 provides that venue is appropriate in the county where the cause of action accrued and in the county where one or more of the defendants reside. §508.010(2),(6). Pursuant to §351.375, the General Assembly has determined that when

§508.010 is applicable, a corporation resides in the county where its registered office and agent are located. State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. banc 1991).

In an effort to file this case in the city of St. Louis and avoid over half a century of clear precedent, Relator implemented the strategy of filing successive petitions to circumvent this Court's prior venue holdings so that she could argue that venue was proper pursuant to §508.040 as to both Mark Pobst and BNSF because when she first instituted suit, BNSF was the sole defendant. This conscious attempt to forum shop and subject individuals to suit in any location where suit is proper as to a corporation under §508.040 was properly rejected by this Court in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo.banc 2001). In order to be consistent with the strong Missouri precedent mandating venue where individuals are joined with corporate defendants, §508.010 must be applied and Respondent properly granted Defendants' Motions to Transfer.

C. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON PUBLIC POLICY.

When the General Assembly declares the public policy of this state, courts are bound to follow that policy. State ex rel. Reser v. Rush, 562 S.W.2d 365, 369 (Mo. banc 1978); State ex inf. Dalton v. Miles Laboratories, 282 S.W.2d 564, 574 (Mo. banc 1955). The General Assembly has established a two-tiered venue system under §508.010 and

§508.040 for the purpose of protecting individual Missouri citizens from being subject to suit in an unlimited number of jurisdictions.

Venue statutes are enacted to provide convenient, logical, and orderly forums for litigation. State ex rel. Etter, Inc. v. Neill, 70 S.W.3d 28, 31 (Mo.App.E.D. 2002); State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 857 (Mo. banc 2001); State ex rel. Quest Communications v. Baldridge, 913 S.W.2d 366, 369 (Mo.App.E.D. 1996). By enacting §508.010, the General Assembly has established a limited number of venues that are statutorily mandated as convenient, logical, and orderly forums for suit against individuals. To subject individuals to lawsuits in venues that are inconvenient and illogical, as heretofore mandated by the General Assembly, would violate the policy behind §508.010. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

Nonetheless, Relator argues that at the instant that an individual is joined via amended petition as a co-defendant with one or more corporations, he or she is treated the same as a corporation for venue purposes. The policy reasons of convenience and fairness to individual defendants do not disappear merely because an individual is joined in a lawsuit by an amended petition filed less than twenty-four hours after the original petition was filed against a corporate defendant, as opposed to being sued in the original petition as a sole defendant. Public policy requires that schemes to eliminate individual venue rights by omitting a party from an original petition and then joining them by an amended petition be prohibited. It is neither convenient nor logical to subject an individual to venue in each and every one of Missouri's counties. The General Assembly

has, as a matter of public policy, determined that individuals should not be subject to being hauled across the state for venue purposes in an unlimited number of counties where that individual neither resides nor where the cause of action arose.

Section 508.010 provides Missouri residents with specific statutory rights governing the location where he or she may be subjected to suit in Missouri. A defendant cannot be deprived of venue rights prior to suit being instituted against him or her, which is what Relator attempted to do by joining Pobst as a defendant along with BNSF less than twenty-four hours after suing BNSF alone pursuant to Missouri's liberal procedural rule regarding joinder of additional parties. Relator's attempt to extinguish individual venue rights prior to the time that the suit was instituted against Mr. Pobst deprives him of his substantive right to be sued in one of those venues mandated by §508.010. Due process of law forbids that any person under the guise of a rule of procedure shall be deprived of established rights. Hayes v. C.C. & H. Min. & Mill. Co., 126 S.W. 1051, 1054 (Mo. 1910). Due process guarantees that an individual receives whatever process is constitutionally mandated or permitted under the laws in effect at the time. Richardson v. State Highway Transportation Commission, 863 S.W.2d 876, 879 (Mo. banc 1993).

Applying traditional rules of statutory construction, this Court has consistently and uniformly interpreted the interplay between §508.010 and §508.040 to harmonize the two statutes together and give meaning to the intent of both to afford individuals the right to be sued only in certain specific locations as set forth in §508.010. First recognizing those rights in 1926 in State ex el. Columbia National Bank v. Davis, 284 S.W. 464, 470 (Mo.

1926), this Court has consistently held that the venue rights of individual defendants prevail over the ability of plaintiffs to select the most potentially lucrative venue in which to file suit when the suit is instituted against both an individual and a corporation by application of the general venue statute, §508.010. State ex rel. Smith v. Gray, 979 S.W.2d 190, 191 (Mo. banc 1998)); State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996).

Plaintiffs cannot be allowed to utilize the corporate venue statute as a means to extend the venue of a civil action against an individual defendant. State ex rel. Merritt v. Mummert, 863 S.W.2d 380, 382 (Mo.App.E.D. 1993). The corporate venue statute was not designed to maximize forum shopping. State ex rel. Gannon v. Gaertner, 592 S.W.2d 214 (Mo.App.E.D. 1979). In Gannon, the plaintiffs engaged in "forum shopping" by filing an action for damages in the city of St. Louis while the facts of the case had no connection to such venue. Id. The court in Gannon noted that the purpose of providing a convenient, logical, and orderly forum for litigation would be thwarted if plaintiffs were permitted to create venue merely by selecting a particular defendant ad litem. Id. at 216.

It is against public policy to allow Relator to manipulate the Missouri venue laws by using a two step process, often referred to as "pretensive non-joinder", in an effort to establish venue where venue would not be proper if the individual was sued initially along with a corporation. The multiple filings employed by Relator pursuant to Missouri's procedural rule regarding amendment of pleadings in an attempt to secure her venue of choice, contradicts the general reasoning in State ex rel. DePaul v. Mummert,

870 S.W.2d 820 (Mo. banc 1994), which clearly provides that plaintiffs are not to be permitted to indirectly create venue where it would not otherwise be proper.

D. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON LEGISLATIVE INTENT.

The General Assembly has mandated those venues where suit is proper against individuals and corporations. *See* §§508.010, 508.040. Of significance is the fact that the General Assembly enacted two distinct venue statutes: §508.010, which applies when individual defendants are sued, and §508.040, which applies to corporate defendants only. It is evident that by enacting two separate statutes, the General Assembly intended for a distinction to be made between corporate defendants and individual defendants when determining proper venue. The General Assembly went to great measures to insure that individuals are subject to suit in a limited number of venues. §508.010; State ex rel. Quest Communications v. Baldridge, 913 S.W.2d 366, 369 (Mo.App.E.D. 1996).

The intended protection of individual defendants subsists in the residency requirements of the general venue statute. §508.010. In sharp contrast, the General Assembly did not extend residency limitations on venue in the corporate venue statute. The corporate venue statute of §508.040 is silent as to the matter of residency, leaving corporations broadly subject to lawsuits in any venue across the state of Missouri where it transacts business. State ex rel Smith v. Gray, 979 S.W.2d 190, 194 (Mo. banc 1998) (concurring opinion); State ex rel Webb v. Satz, 561 S.W.2d 113,14 (Mo. banc 1978).

It is well settled that the general venue statutes govern in suits filed against both corporate and individual defendants. State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996); State ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc. 1994); State ex rel. Dick Proctor Imports, Inc. v. Gaertner, 671 S.W.2d 273, 274 (Mo. banc 1984); State ex rel. Hails v. Lasky, 546 S.W.2d 512, 515 (Mo.App.E.D. 1977). Courts have always applied §508.010 in these circumstances and have never applied §508.040 where there was a corporate and an individual defendant. *See e.g.*, State ex rel Breckenridge, 920 S.W.2d at 902; State ex rel. Dick Proctor, 671 S.W.2d 273, 274 (Mo. banc 1984).

Allowing an individual defendant to be subject to suit in a broad range of venues, as advocated by Relator, negates the intent of the legislature and frustrates the public policy behind the venue statutes. Subjecting individuals to venue as determined by §508.040 ignores the fundamental and inherently different characteristics of corporations and individuals that mandate disparate treatment between individual and corporate defendants. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 349 (Mo. banc. 1962); Julian v. Kansas City Star Co., 107 S.W. 496 at 499 (Mo. 1907).

The very existence of the two separate statutes illustrates the legislative intent to protect individuals by limiting permissible venues in which they can be sued. Surely the General Assembly did not intend that individual venue rights could be manipulated out of existence by the mere institution of a lawsuit against an individual by Amended Petition. It is absurd to believe that the General Assembly intended that §508.010 would be

applicable to determine venue if an individual was joined in a suit with a corporation in an original petition, but would not be applicable if the individual was joined by amended petition filed one day after the original petition. It is even more absurd to believe that, in enacting the general venue statute, which limits those locations in which individuals can be sued, the General Assembly intended that a plaintiff could avoid the application of the statute simply by manipulating the timing and manner of joining an individual in the suit so as to abrogate individual venue rights pursuant to a procedural rule of court. State ex rel. Turnbough v. Gaertner, 589 S.W.2d 290 (Mo. banc 1978).

In Turnbough, this Court held that the Missouri Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the Courts of Missouri or the venue of civil actions therein." Missouri Rule of Civil Procedure 51.01; Turnbough at 292; State ex rel. Merritt v. Mummert, 863 S.W.2d 380, 382 (Mo.App.E.D. 1993). In Turnbough, as in this case, the plaintiff attempted to use a procedural rule of court, Rule 52.05(a), pertaining to permissive joinder of parties, to acquire venue in the city of St. Louis over an individual defendant where venue was not proper except for the joinder with another cause of action. Id. at 292. "Even though establishment of venue by a procedural rule may be permissible, such a determination was avoided by the court by the disclaimer contained in Rule 51 that venue was not to be established or limited on the basis of the Rules of Civil Procedure." Id.

Turnbough expressly held that even though the claims against both corporate and individual defendants, may be properly joined, as in this case, that fact alone would not

establish venue as to the individual defendant when venue would not have existed without the joinder: "To hold otherwise would mean that, contrary to the express provisions of rule 51.01, venue as to [the individual defendant] would be established by means of Rule 52.05(a) when it would not have existed without such joinder." Id. at 292.

Relator cannot extend venue pursuant to a procedural rule. Id. Relator cannot do indirectly in contravention of legislative intent what she is unauthorized to do directly. Other attempts to do so have been rejected by the Court. Kendall v. Sears Roebuck and Co., 634 S.W.2d 176, 179-80 (Mo. banc 1982).

E. THE ORDER OF RESPONDENT TRANSFERRING THIS CASE TO A COUNTY CONSISTENT WITH §508.010 IS PROPER BASED ON THE RULE OF *STARE DECISIS.*

It is well settled that the "Supreme Court should not lightly disturb its own precedent, and mere disagreement by the current court with the statutory analysis of a predecessor court is not a satisfactory basis for violating the doctrine of *stare decisis*, at least in the absence of a recurring injustice or absurd results." Crabtree v. Bugby, 967 S.W.2d 66, 71-72 (Mo. banc 1998). As noted in the Summary of Argument, that is exactly what Relator seeks to do in this proceeding. *Stare decisis* is the cornerstone of our legal system. M&H Enterprises v. Tri-State Delta Chemicals, Inc., 984 S.W.2d 175, 178 (Mo.App.S.D. 1998) (footnote 3). In U.S. Life Title Insurance Co. v. Brents, 676 S.W.2d 839, 841 (Mo.App.W.D. 1984), the Court stated "where the same or an

analogous issue was decided in a prior case, the prior case stands as authoritative precedent, by doctrine of *stare decisis*."

It is undisputed that the doctrine of *stare decisis* is essential to providing a clear, consistent, and fair application of the law. To prevent arbitrary and unpredictable decisions, courts are faced with the duty to follow past precedent to provide the legal system with the consistency that it needs to survive. For these reasons, this Court must decide this matter in accordance with the Linthicum decision - a case that this fact pattern mirrors.

In her brief, Relator re-argues the Linthicum decision and claims that State ex rel. DePaul v. Mummert, 870 S.W.2d 820 (Mo. banc 1994), should control, dictating that venue should be determined at the time the case is "brought." Relator interprets DePaul's use of the term "brought" to mean, "originally filed," citing numerous cases to support this proposition. This interpretation of the term "brought" is obviously not what the General Assembly intended in its enactment of the venue statutes. Contrary to Relator's claims, it has been held that, "Although a suit is 'brought' against the original defendants when the petition is initially filed, in like manner, it is also 'brought' against subsequent defendants when they are added to the lawsuit by amendment." Bailey v. Innovative Mgmt. & Inv. Inc., 890 S.W.2d 648, 650-51 (Mo. banc 1995). In an attempt to remain true to the legislative intent underlying the Missouri venue statutes, venue must be determined whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 858

(Mo. banc 2001). As stated by this Court in Linthicum, "[t]his interpretation protects all party defendants equally and gives effect to the intent of the legislature in enacting section 508.010 (3)." Id.

Another assertion by Relator is that the plain language of the statute does not support the holding in Linthicum and that §508.040 by its terms allows venue in any county where the railroad transacts business or has a line of railroad. Relator fails to acknowledge that her position is contrary to over half a century of precedent and to the plain language of §508.010, which has been consistently interpreted as applicable when an individual defendant is sued along with a corporation, and which limits venue to where either of the defendants reside or where the cause of action arose. Relator conveniently focuses on the language of §508.040 to the exclusion of §508.010. The language of §508.010 does not indicate that it is not applicable if the suit is instituted against an individual by amended petition. Such an interpretation is contrary to the plain and ordinary meaning of the language used in the statute and the interpretation produces an absurd and unreasonable result in violation of another cannon of statutory construction. Rothschild v. State Tax Commission of Missouri, 762 S.W.2d 35, 37 (Mo. banc 1988).

To be true to the doctrine of *stare decisis* this Court must continue to hold that §508.010 applies to individual and corporate co-defendants, as it has held so many times before. *See e.g*., Brekenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc. 1996); Sate ex rel. Malone v. Mummert, 889 S.W.2d 822, 824 (Mo. banc 1994); State ex rel.

Turnbough v. Gaertner, 589 S.W.2d 290, 291 (Mo. banc. 1979); State ex rel. Dick Procter v. Gaertner, 671 S.W.2d 273, 274 (Mo. banc. 1984).

An order denying Defendant's Motion to Transfer would virtually abolish the venue rights of individuals sued together with corporations. This outcome is in contravention of over a half century of established law. Such an order would engraft the corporate venue statute, §508.040, on individuals thereby replacing the general venue statute, and thus permit plaintiffs to do indirectly what could not be done directly. This result is in discord with the intent of the General Assembly and the doctrine of *stare decisis*. State ex rel. Whiteman v. James, 265 S.W.2d 298, 300 (Mo. banc 1954).

F. STATE EX REL. LINTHICUM V. CALVIN IS CONSISTENT WITH PUBLIC POLICY AND LEGISLATIVE INTENT AND SHOULD NOT BE OVERTURNED.

In State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001), this Court decisively struck down the two step joinder process, referred to as pretensive non-joinder. Pretensive non-joinder was used by Relator in hopes of doing indirectly what could not be done directly. The strategy employed by Relator is a simple, manipulative strategy used in her desperation to obtain the venue of her choice.[5] The Linthicum holding is

[5] One must wonder why Relator would not want to file suit in the county where she resides, where she and her husband would likely be known by residents and jurors, and where the residents and jurors would be familiar with the grade crossing where the accident occurred.

challenged by Relator as it greatly hampers her quest to shop around for the most favorable venue. This challenge cannot stand. Linthicum secures the proper legislative intent behind the venue statutes by holding that a case is properly "brought" whenever an amended petition is filed to add a new defendant. Linthicum, 57 S.W.3d at 858.

In support of her position, Relator cites numerous cases that were decided prior to Linthicum; all holding that the appropriate time to determine venue was at the initial filing. While Relator correctly states the general rule from DePaul and like cases, that venue is determined at the time the suit is "brought", Relator applied the rule to the wrong petition. Suit was instituted or "brought" against Defendants upon the filing of Plaintiff's Amended Petition. By filing an Amended Petition, Relator abandoned her original Petition. State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 342 (Mo. banc. 1988); Weir v. Brune, 256 S.W.2d 810, 811 (Mo. banc. 1953). The state of the law regarding this matter could not be clearer. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001); Bailey v. Innovative Mgmt. & Inv. Inc., 890 S.W.2d 648, 650-51 (Mo. banc 1995). Neither DePaul nor any of the other cases cited by Relator have held that the filing of an amended petition abolishes the venue rights of all subsequently added individual defendants, and rightfully so. The policy underlying DePaul clearly provides that plaintiffs are not to be permitted to create venue where it would not otherwise be proper. Relator however attempts to manipulate the language used by the court in DePaul to achieve exactly that which the DePaul court sought to prevent. The argument

that venue should be determined when a case is "first brought" ignores the policy supporting the venue statutes.

What Relator does not want to acknowledge is that the holding in Linthicum was necessary to maintain the protection of individuals and prevent forum shopping. Linthicum closed a loophole that has been manufactured and exploited by plaintiffs using the exact strategy attempted by Relator in this case. For this reason, Linthicum is essential to the Missouri venue structure. Overturning Linthicum would subject individuals to suit all over the state without protection under §508.010 and would deprive them of due process of the law. Linthicum is true to legislative intent. Its holding harmonizes the rule of statutory interpretation and legislative intent. To overrule Linthicum would be to rewrite the entire structure and foundation of the Missouri venue statutes.

Relator also argues that Linthicum was decided subsequent to the filing of this suit and that it should not be applied retroactively. This argument is without merit and should be rejected. First, Linthicum did not change or overturn existing law, it merely held that the scheme devised by the plaintiff's bar to create venue where venue would otherwise not be proper would not be permitted to stand in light of the long standing prior rulings of this Court interpreting Missouri venue statutes. Secondly, even if it could be argued that this Court changed Missouri's long standing venue law, the change in law is retroactive unless the Court expressly holds that it only apply prospectively. Trans UCU, Inc., Director of Revenue, 808 S.W.2d 374 (Mo. banc 1991).

Additionally, inconsistent with Relator's claim, several cases have been remanded since the October 23, 2001 Linthicum decision ordering "A peremptory writ of mandamus… to issue directing the trial court to determine venue in accord with Linthicum." State ex rel. Miracle Recreation Equipment Co. v. O'Malley, 62 S.W.3d 407 (Mo. banc 2001); State ex rel. Landstar Ranger Inc. v. Dean, 62 S.W.3d 405, 405 (Mo. banc 2001). Linthicum is consistent with public policy and legislative intent and should not be overturned.

G. STATE EX REL. LINTHICUM V. CALVIN DOES NOT BESTOW AN UNDESERVED BENEFIT ON INDIVIDUALS OR CORPORATIONS WHEN JOINED TOGETHER AS DEFENDANTS.

Relator also suggests that Linthicum be overruled because it bestows an undeserved benefit on defendants. This argument is without merit. Defendants are not receiving any such benefit. When a corporation alone is sued by a plaintiff, that corporation is broadly subject to suit in plaintiff's chosen venue. State ex rel Webb v. Satz, 561 S.W.2d 113, 114 (Mo. banc 1978). Relator's ability to select a potentially lucrative venue is nearly unrestrained by the Missouri venue laws when a corporation is the only defendant. §508.040.

When a corporation is sued together with an individual defendant, a corporation still has almost no control over the venue for the litigation. The corporation does not control the residence of the individual defendant and likewise does not control the county in which the plaintiff's cause of action accrued. The defendant corporation is however

permitted by statute to select the county of its registered agent for service of process as its residence for purposes of §508.010. To that degree, it is true that a corporation may determine in advance at least one possible location in which it may be sued in the future. However, such a small concession in the wake of the burdens that Relator seeks to impose on individual defendants can hardly be characterized as an undeserved benefit for individuals or corporate co-defendants.

The problem here is not an "undeserved benefit" received by an individual defendant arising out of the recent holding in Linthicum; it is the undeserved benefit Relator seeks to obtain. Relator desires having a claim that is not removable to federal court on the basis of diversity jurisdiction, while simultaneously retaining the benefit to keep this case in state court in the city of St. Louis and subject Mark Pobst to suit there where it would not be proper if Mark Pobst was joined initially with BNSF.

The initial omission of Mr. Pobst from the Original Petition was obviously not an oversight as without his presence, Relator's case would be removed to federal court, and it is obviously not the city of St. Louis *per se* where Relator desires to be, but in state court in the city of St. Louis. Pursuant to federal law, a foreign corporation such as BNSF, with its principal place of business in another state, can remove an action filed in state court to federal court based on diversity jurisdiction when the amount in controversy exceeds the minimum jurisdiction amount for federal court jurisdiction. 28 U.S.C. § 1441(b). However, a defendant is precluded from removing the case to federal court once an amended petition joining a non-diverse defendant is filed. Determined to keep

this case in state court in the city of St. Louis, Relator added Mark Pobst as a defendant on September, 13, 2001, less than twenty-four hours after the initial pleading was filed. If, of course, service is made of the initial petition prior to the filing of an amended petition, the sole diverse defendant could exercise its right to remove the case to federal court.[6] Such forum shopping and circumventing of the Missouri venue statutes by Relator should not be allowed.

Venue must be determined at the time suit was instituted against BNSF and Mark Pobst. To hold otherwise would mean that an individual subsequently joined with a corporate defendant, as in this case, has no venue rights, thereby permitting plaintiffs to obtain venue in the city of St. Louis by selectively filing multiple petitions against different parties to maneuver around the rights and protections established by the General Assembly.

Linthicum is not only the law and should not lightly be overturned; it is also good law. In Linthicum the plaintiff employed the same pretensive non-joinder scheme attempted by Relator in the case *sub judice*. The majority in Linthicum rejected the plaintiff's pretensive non-joinder, declaring that venue must be reconsidered at the time the pleading was amended to add subsequent defendants not included in the initial petition. Even Judge Stith's partial concurrence and partial dissent recognizes that the

[6] However, even following removal, if a plaintiff sought to add a non-diverse party as a defendant, the federal court has the power, and routinely exercises it, to remand the case to state court. 28 U.S.C. §1447(e).

Court could reach the same result by limiting the re-determination of venue in light of amended petitions to cases in which amended pleadings have been filed before service of the original petition or before the filing of the original defendant's answer, which was done in this case. Linthicum at 865.[7] Not allowing individual defendants, such as Mark Pobst, who fall victim to plaintiffs' implementation of pretensive non-joinder, their venue rights as determined by §508.010, allows plaintiffs to blatantly circumvent Missouri's venue laws.

H. DETERMINING VENUE WHEN NEW DEFENDANTS ARE ADDED VIA AMENDED PETITION, AS OPPOSED TO THE INITIAL PETITION, DOES NOT RENDER VENUE EVER-CHANGING, NEVER-RESOLVED, AND UNPREDICTABLE.

Relator's argument that the Linthicum holding is unworkable in practice as it provides a never-ending series of venue changes is inaccurate. What Relator fails to acknowledge is that proper and improper venues exist for every cause of action. Only causes of actions subject to improper venue are transferable. State ex rel. Vaughn v. Koehr, 835 S.W.2d 543, 544 (Mo.App.E.D. 1992). Likewise, transfer of venue can only be made to a proper venue, thereby preventing further transferability due to venue challenges when additional parties are joined in the lawsuit..

[7] Judge Stith notes that this simple approach would resolve most of the writs filed in the Supreme Court of Missouri that raise the issue of "pretensive non-joinder," including this case.

In State ex rel. Mellenbrunch v. Mummert, 821 S.W.2d 108, 109 (Mo.App.E.D. 1991) the court held, "Section 476.410 authorizes a circuit judge to transfer a case to another circuit in which it could have been brought but only if venue is improper in the circuit court in which the case was filed." A transfer of venue when the cause of action is filed in a proper venue is in excess of a judge's jurisdiction. Id. If the case is filed in a proper venue, transferring the case to another venue would be void. Hefner v. Dausmann, 996 S.W.2d 660, 663 (Mo.App.S.D. 1999).

As it is clear that §508.010 applies to the case *sub judice*, there are limited jurisdictions in which a plaintiff can establish venue. §508.010. A plaintiff seeking to file suit against both a corporate and an individual defendant may file suit against both defendants in either (1) the county in which the cause of action occurred, or (2) any county where any defendant resides. §508.010(2),(6). As applied to this case, there are three available forums that would give rise to proper venue under §508.010.

First, venue would be proper in Perry County, Missouri. Perry County is where the accident involved in this proceeding occurred. Section 508.010 (6) of the Missouri venue law states, "In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties…." §508.010(6); *See also* State ex rel. England v. Koehr, 849 S.W.2d 168, 169 (Mo.App.E.D. 1993). If Relator initially filed suit in Perry County, the case would not be transferable to another county even if Relator subsequently joined Mr. Pobst. The second venue in which Relator could have properly filed this suit, would have been in Scott County, Missouri.

Defendant Mark Pobst resides in Scott County, and under the plain language of §508.010, it is evident that such location would be a proper venue and thereby non-transferable. See §508.010 (2), which authorizes venue where "any defendant resides." The third venue in which this cause of action can be litigated is in St. Louis County, where BNSF maintains its registered agent or office.

In light of the above, it is evident that had Relator initially filed this suit in any one of three proper venues, her concerns and the inaccurate argument regarding never-ending transfers of venue would be non-existent. Now that this case has been transferred to St. Louis County, the suit will not be subject to further transfer as St. Louis County is an appropriate venue under §508.010(2). Subsequent parties may expand venue possibilities, but not make a properly venued case subject to transfer unless Relator attempts, as here, to impermissibly manipulate venue.

It is obvious by the timing of the filing of the original petition and Relator's Amended Petition, that the failure to include Mr. Pobst as a defendant in the original Petition was not an unintentional oversight. He was added to prevent removal of the case to federal court. Thus, the necessity for the change in venue in this case is created solely by Relator's subsequent joinder of Mark Pobst which she intended to join all along. Relator can hardly complain of changes in venue created solely by her own attempt to improperly create venue.

The venue law as set out in Linthicum is not unworkable in practice. When suit is filed in an appropriate venue, the cause will no longer be subject to transfer. This is not a

never-ending, unpredictable rule. If Relator had filed suit in any three of the proper venues as provided in §508.010(2) and § 508.010(6), venue would not be subject to transfer even if later defendants were added. The sole cause of Relator's "inconvenience" was her own conscious decision to initially file this cause of action in a venue that was not proper under §508.010 when an individual is joined with a corporation as a defendant.

Furthermore, if Relator does not want to disturb venue set by the filing of the original petition, Relator does not have to file an amended petition. However, this leaves the Relator unable to circumvent removal to federal court under 28 U.S.C. §1441(b). Given the multiple choices for venue established by §508.040 and §508.010, Relator can hardly complain about a lack of venue choices, nor can Relator demonstrate any prejudice by affording each defendant the venue rights mandated under Missouri law.

II. RELATOR IS NOT ENTITLED TO A WRIT OF MANDAMUS COMPELLING RESPONDENT TO VACATE THE ORDER OF TRANSFER BECAUSE VENUE IS NOT PROPER IN THE CITY OF ST. LOUIS PURSUANT TO §508.010(2) AS BNSF IS NOT A RESIDENT OF THE CITY.

Relator asserts that even if §508.010 applies, as it clearly must for the reasons set forth above, this case should still not have been transferred from the city of St. Louis to St. Louis County because BNSF "resides" in the city of St. Louis. Section 508.010 reads, in pertinent part: "Suits instituted by summons shall, except as otherwise provided by

law, be brought: (2) when there are several defendants, and they reside in different counties, the suit may be brought in any such county." §508.010.

A. UNDER §508.010, BNSF RESIDES IN ST. LOUIS COUNTY, NOT THE CITY OF ST. LOUIS AS ARGUED BY RELATOR.

For purposes of determining venue under §508.010, the residency requirement of a corporate defendant is governed by §351.375 (2). This section states, in pertinent part: "The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained." §351.375(2).

A corporation does not have a residence unless such a residence is provided by statute. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 349 (Mo. banc 1962). The residence of a corporation is only an issue if a corporation is sued together with an individual defendant. In this event, residency must be established. §508.010.

The residence of a corporation, with the notable exception of insurance companies, is determined pursuant to §351.375(2). This statute provides, for all purposes, a corporation is a resident of the county in which it maintains its registered agent for service of process. §351.375. The "for all purposes" language includes determination of venue under §508.010(2). State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991). The distinction upon which Relator hangs her hat is an "alleged" difference in law applicable to foreign as opposed to domestic corporations. In this argument, Relator argues that if an individual is sued with a domestic corporation, the corporation resides only where its registered agent is located for venue purposes, but

if an individual is sued with a foreign corporation, a foreign corporation resides in any location where venue is proper under §508.040.

It is clear that a domestic corporation resides solely in the county where its registered agent resides. In State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951) this Court held that § 351.375 limited corporate venue to the county where its registered agent was located for determining residence for purposes of §508.010(2). Several years after O'Keefe was decided, this Court, in State ex rel. Whiteman v. James, 265 S.W.2d 298 (Mo. banc 1954), ruled that venue was improper in Jackson County where the individual defendant resided in Andrew County and a foreign corporate defendant, although having an office in Jackson County, had their registered agent in the city of St. Louis. 265 S.W.2d 298 (Mo. banc 1954). Whiteman cited O'Keefe as authority, stating that the "only difference between that case and this is that there the corporation was a domestic corporation and service upon it was undertaken under another statute. These circumstances are without significance, and so do not justify any other or different construction of the statutes." Id. at 300. In conformity with O'Keefe, this Court held that proper venue, in terms of the foreign corporate defendant's residence, was the county in which the corporation's agent was registered. Id.

Relator pays great deference to the decision in Stamm v. Mayfield, 340 S.W.2d 631 (Mo. banc 1960), and argues that Stamm overruled Whiteman insofar as it applied §351.375 to foreign corporations. Relator's reliance on the Stamm decision is misplaced by virtue of this Court's decision in State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo.

banc 1962). In Bowden this Court held that a foreign corporation resides where its registered agent is located, distinguishing the prior holding in Stamm on multiple levels.

One distinction recognized by this Court between Bowden and Stamm is that Stamm is applicable to foreign insurance companies, which are treated differently, statutorily, than foreign corporations. Another ground upon which Bowden distinguished Stamm in terms of its holding that §351.375 is applicable to foreign corporations was by noting that Stamm stated that the "all purposes language" in regards to foreign corporations was "mere obiter." Both State ex rel. Stamm v. Mayfield and State ex rel. Smith v. Gray, 979 S.W.2d 190 (Mo. banc 1998), are relied on by Relator in claiming that foreign corporations should be considered to "reside" wherever they transact business. To Relator's misfortune both of these cases involve foreign insurance companies, not foreign corporations. Section 351.690(2) makes it clear that, except for specific exceptions, insurance companies are not subject to the corporate venue statute §508.040. This Court has clearly held that business corporation laws, regardless of whether the corporation is domestic or foreign, do not apply to foreign insurance corporations when determining venue under §508.010(2). State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 198 (Mo. banc 1991).

Relator also argues that this Court should adopt Judge Wolff's suggestion in State ex rel. Smith v. Gray, 979 S.W.2d 190, 194 (Mo. banc 1998), that a corporation should be held to reside under §508.010 in every county where venue is proper under §508.040 for venue purposes. Id. While Judge Wolff's suggestion would of course subject individual

defendants such as Mr. Pobst to suit in multiple additional venues and drastically change existing law, it was certainly worthy of consideration by the General Assembly and no doubt was, as is his suggestion that "the St. Louis city-county venue maneuvers be, which have accounted for much of our case law on this subject, be ended by merging the jury pools in the city and county."[8] Linthicum, 57 S.W.3d at 860. In Linthicum, Judge Wolff noted that the distinction between city of St. Louis jurors and St. Louis County jurors has a tendency to skew the jury composition of those separate jurisdictions to be unrepresentative of the community at large. Id. However, unless these suggestions raise constitutional issues to be addressed by the Court, these suggestions to change existing law are in fact the province of the General Assembly, not the Court.

BNSF is not an insurance company but is a foreign corporation with its registered agent in St. Louis County and the cases Relator relies on are readily distinguishable and do not control the facts of the case at hand. The definitions set forth in §351.015 apply to the entire chapter, including foreign corporations, "unless the context otherwise requires." §351.015. Section 351.582 specifically states that a foreign corporation authorized to do business in Missouri has the same but not greater rights and privileges as a domestic corporation, and that foreign corporations are "subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." §351.582. Such language indicates that the residence of an authorized

[8] It can be presumed that the General Assembly considered Judge Wolff's suggestions and rejected them. See Sec. III.

foreign corporation such as BNSF is the same as that of a similar domestic corporation. Such an intent to include foreign corporations is additionally apparent in light of the "any corporation" language used in §351.375(2), stating, "[t]he location or residence of *any corporation* shall be deemed for all purposes to be in the county where its registered office is maintained." §351.375(2).[9]

Although not cited by Relator, §351.690(4) extends the provisions of Chapter 351 of the Missouri statutes to almost all defendants, including foreign railroad corporations such as co-defendant BNSF. Thus, the residency statute of §351.375 applies to BNSF via §351.690(4). Chapter 351 was clearly intended to give foreign business corporations a specific, definite, and certain residence, and when construed with §508.010, provides for the proper protection of the venue rights of individual defendants who may be joined with corporate defendants. State ex rel. Bowden v. Jensen, 359 S.W.2d 343, 350 (Mo. banc 1962).

B. AS A FOREIGN RAILROAD CORPORATION, BNSF WOULD NONETHELESS BE ENTITLED TO THE SAME BENEFITS AFFORDED TO A DOMESTIC CORPORATION EVEN IF THERE WAS ANY MERIT TO RELATOR'S ARGUMENT THAT FOREIGN

[9] If one followed Relator's argument, a foreign corporation would not be required to comply with the requirement to maintain a registered agent in the state for service of process.

CORPORATIONS SHOULD BE TREATED DISPARATELY FROM DOMESTIC CORPORATIONS.

Although Relator's argument that domestic corporations must be treated differently for venue purposes than foreign corporations has no merit, as a railroad corporation, BNSF would be entitled to the same benefits as a domestic corporation under Missouri law. §388.290. Section 388.290 provides that upon the consolidation of two or more railroads, the consolidated railroad is "entitled to all the powers, rights, privileges, and immunities" of any of the railroads prior to the consolidation. *See also* MO. CONST. art. XI §10.[10]

The St. Louis-San Francisco Railroad Company was incorporated in Missouri in 1916 and in 1980 it merged with Burlington Northern Railroad Company, a foreign corporation. (Appendix A-16, Mo. Sec. of State.) Burlington Northern Railroad Company subsequently merged with the Atchison, Topeka and Santa Fe Railway Company and was renamed The Burlington Northern and Santa Fe Railway Company. (Appendix A-17, A-18, Mo. Sec. of State.) Under these circumstances BNSF is afforded the same status as a domestic corporation under Missouri law.

[10] "If any railroad corporation organized under the laws of this state shall consolidate by sale or otherwise, with any railroad corporation organized under the laws of any other state, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this state shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place." Mo. Const. Art. XI § 10.

III. THE GENERAL ASSEMBLY IS PRESUMED TO BE KNOWLEDGEABLE OF THIS COURT'S DECISIONS INTERPRETING §508.040 AND §508.010 AND THE GENERAL ASSEMBLY'S APPROVAL OF THESE DECISIONS IS LIKEWISE PRESUMED.

Since this Court's 1951 opinion in State ex rel. O'Keefe v. Brown, 235 S.W.2d 304 (Mo. banc 1951), neither §508.040 or §508.010 have been modified by the General Assembly to subject individuals to suit in any venue where a corporation may be subject to suit under §508.040. Additionally, with full knowledge of this Court's decision interpreting §351.375 and its interplay with the venue statutes, the General Assembly has not enacted any legislation disapproving of this Court's prior interpretation of the statute. Where the General Assembly, after a statute has received judicial construction by a court of last resort, reenacts it, carries it over without change, or reincorporates exact language theretofore construed, it must be presumed that the General Assembly knew of and adopted such construction. State ex rel. Smith v. Atterbury, 270 S.W.2d 399, 403-404 (Mo. banc 1954); Duckworth v. U.S. Fidelity & Guaranty Co., 452 S.W.2d 280, 286 (Mo.App.E.D. 1970) (noting that there is a similar rule of construction requiring that, after a statute had received a settled judicial construction by the courts of last resort, the General Assembly was deemed to have known and adopted the construction).

Had the Court misinterpreted the intent of the legislature in O'Keefe in 1951 or in any other case following O'Keefe, including Linthicum, it can be presumed that the General Assembly would have corrected this mistake. Any change in interpretation of

the law that has been intact for almost half a century is the function of the General Assembly, not the Court's. The lack of action by the General Assembly is irrefutable evidence that the Court has correctly interpreted the intent of the venue statutes. The General Assembly has accepted this Court's prior interpretation of the interplay between §508.010, §508.040, and §351.375 as reflecting the intent of the venue statutes. "Those who disagree with the statute or this Court's precedent analyzing the statute are free to seek redress in the legislative arena." Crabtree v. Bugby, 967 S.W.2d 66, 77 (Mo. banc 1998); Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105, 110 (Mo. banc 1989).

As noted by this Court in Dow Chemical v. Director of Revenue, 834 S.W.2d 742, 745 (Mo. banc 1992):

> It is not only the text of a statute that makes the legislative intent known, however, but also the judicial decisions that construe and give effect to the statute. State v. Crawford, 478 S.W.2d 314, 317 (Mo. 1972). The construction of a statute by a court of last resort becomes a part of the statute "as if it had been so amended by the legislature." *Citing* Cramp v. Board of Public Instruction, 368 U.S. 278, 285, 82 S.Ct. 275, 280, 7 L.E.d.2d 285 (1961).

Not only does the rule of *stare decisis* require that this Court's prior precedent not be overturned absent a change in legislation, the rules of judicial and statutory

construction mandate against changing the prior judicial interpretation of the meaning and intent of a statute. State v. Rumble, 680 S.W.2d 939, 942 (Mo. banc 1984).

Retention of this case in the city of St. Louis is in clear contravention of Missouri's venue law. If Missouri's venue statutes are to be changed, the General Assembly is the proper forum for change, not the Court. While public policy arguments may be made as to why individuals should be subject to suit in additional venues, it is not the province of the Court to question the wisdom or social desirability of the underlying statute. Batek v. Curators of University of Missouri, 920 S.W.2d 895, 899 (Mo. banc 1996).

The General Assembly is presumed to know and approve of what the courts have decided, and it is clear that the General Assembly must have approved the proposition that §508.010 is the appropriate venue statute to govern the facts in this case. State ex rel. Brekenridge v. Sweeney, 920 S.W.2d 901, 902 (Mo. banc 1996). It is also evident that the General Assembly approved the appropriate timing for determination of venue to include not only initial pleadings, but also subsequent amendments adding parties. State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001).

In this same vein, it is presumed that the General Assembly approved Bowden and related cases to stand for the proposition that foreign corporations are to be treated like domestic corporations, and §351.375 is to be used to determine the residence of a foreign corporation for venue purposes. State ex rel. Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc 1962).

IV. A DETERMINATION THAT FOREIGN CORPORATIONS RESIDE WHERE THEY MAINTAIN THEIR REGISTERED AGENT AND IN ANY COUNTY WHERE THEY HAVE OFFICES OR AGENTS FOR THE TRANSACTION OF BUSINESS WILL SUBSTANTIALLY INCREASE THE NUMBER OF LAWSUITS FILED IN THE CITY OF ST. LOUIS OR OTHER PREFERRED PLAINTIFFS' VENUES, TO THE DETRIMENT OF INDIVIDUALS, OTHER DISTRICT COURTS, OTHER COUNTIES, AND TO THE DETRIMENT OF RESIDENTS OF THE CITY OF ST. LOUIS.

A decision holding that, under §508.010, foreign corporations "reside" in any county where they maintain their registered agent and in any county where they have offices or agents for the transaction of business will nullify the limits placed on venue by the General Assembly when individuals are sued. This radical change of Missouri precedent will abolish virtually all venue rights of individuals, which are rightfully protected under §508.010, and will cause an increase in cases filed in the city of St. Louis or other preferred plaintiffs' venues.

Even without opening the floodgates to bring more cases to the city of St. Louis as Relator advocates, statistics from the Missouri Judicial Report Supplement for the fiscal year of 2001 show that 6,488 general civil cases were filed in the city of St. Louis.[11] If

[11] In contrast, only 144 similar cases were filed in Scott County, Missouri, and a mere 66 similar cases were filed in Perry County, Missouri, Missouri Judicial Report Supplement, 2001.

plaintiffs are, by judicial fiat, permitted to file even more cases in the city of St. Louis, a negative impact will fall not only on individual defendants, but also on the residents of the city of St. Louis. Currently, the citizens of the city of St. Louis have a tremendously disproportionate burden of jury service. In Judge Wolff's partial concurrence and partial dissent in State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 858 (Mo. banc 2001), he noted that in 1999 - 2000, thirty percent (30%) of the city's adult population over the age of 21 were summoned for jury duty in the city of St. Louis, while only two percent (2%) of St. Louis County's adult population over the age of 21 were summoned. Id. at 861. Judge Wolff has also noted that a resident of the city of St. Louis qualified for jury service is guaranteed to be called to jury duty at least once every two years. This makes for the "recycling and reusing of jurors which is warning of the prospect that people will become more resistant to jury service." Donna Walter, *Juries a Hot Topic at Annual Bench & Bar Conference*, ST. LOUIS DAILY RECORD, June 12, 2002, at 1, 48. As noted by Judge Wolff in Linthicum, "[f]rom the data recited here, it is quite clear that jury service may be disproportionately costly for some of our citizens who reside in the city of St. Louis. Id. at 862. This burden will only increase if the St. Louis population base continues to decline as projected by the state. See Linthicum, Id. fn 12 at 861. Such negative effects on individual defendants, as well as the residents of preferred venues must be considered by this Court as a matter of public policy.

Conversely, if this Court opens the floodgate to permit a new wave of lawsuits to be filed in the city of St. Louis, courts in other counties will not receive their share of

lawsuits and will be left with a sparse caseload. Allowing plaintiffs to file an ever-increasing number of cases in the city of St. Louis will strip other courts of the opportunity to adjudicate many cases and preclude local juries from deciding issues that may have a significant impact on their community or their residents. The filing of litigation in the county where the cause of action occurred or where an individual resides involves not only the local residents as parties in the cases and involves issues of concern to the local community, it also has an economic impact on the community. Permitting cases such as this case to be filed in the city of St. Louis will have a negative impact on courts and other counties, particularly rural counties throughout the state. These, and other policy considerations dictate that Missouri's venue law not be changed as advocated by Relator.

CONCLUSION

Respondent's Order transferring this case to St. Louis County is proper. It has repeatedly and consistently been held that §508.010 is applicable when an individual is joined with a corporate defendant. Never has this Court held that §508.040 shall apply in such circumstances. The current state of the law and *stare decisis* irrefutably lead to the conclusion that BNSF "resides" in St. Louis County, the county where BNSF maintains its registered agent pursuant to §508.010. Linthicum properly recognized the intent of the General Assembly to limit venue when individuals are joined in a suit with a corporation, and upheld the integrity of the two-tiered Missouri venue provisions. Linthicum also properly rejected the very same manipulative scheme employed by

Relator to create venue where it would not exist had Relator joined Mark Pobst in the Original Petition. Respondent, although not infallible, listened to what this Court stated in Linthicum, and got it right.

The Alternative Writ of Mandamus should be denied and Respondent's Order transferring venue to St. Louis County should be affirmed.[12]

Respectfully submitted,

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[12] Counsel for Respondent gratefully acknowledges the assistance of Jason Conway, law student at Washington University School of Law, Carolyn Grigsby, Kristin Kadlek, and Tricia Middendorf, law students at Saint Louis University Law School, who work as summer clerks at Brasher Law Firm, L.C., in the preparation of this brief. Each of them will be forever disillusioned should Respondent's Order of Transfer not be affirmed.

APPENDIX

CERTIFICATION OF COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This brief includes the information required by Rule 55.03, including the undersigned's address, Missouri Bar number, telephone number, and fax number;

2. This brief complies with the limitations contained in Rule 84.06(b);

3. This brief contains 12,951 words according to the word-processing systems used to prepare the brief; and

4. This brief contains 1,313 lines of type according to the line count of the word-processing system used to prepare the brief.

5. Microsoft Word was used to prepare Respondent's brief.

6. The diskette provided with this brief has been scanned for viruses and is virus free.

_____

William A. Brasher #30155

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief and one copy of accompanying disks were mailed via U.S. Mail, first-class, postage prepaid, on this 12th day of August, 2002, to:

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